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BASTI BEGAM v. BANARSI PRASAD.

plaintiff should be paid to the defendant "or other persons entitled to receive the same."

We direct that the decree be accordingly modified. In other respects, we affirm the decision of the lower appellate Court, and as the appellant has substantially failed in her appeal, we dismiss it, save as aforesaid, with costs.

Decree modified.

MISCELLANEOUS CIVIL.

1908
April 8.

Before Mr. Justice Banerji and Mr. Justice Richards.

IN THE MATTER OF THE PETITION OF KHALIL AHMAD AND ANOTHER.*

Muhammadan law—Gift—Usufruct—Ariat.

Held upon application for review of judgment in the case of *Mumtaz-un-nissa* v. *Tufail Ahmad* (1) that what was decided in that case was that the transfer there in question was not an absolute gift, so that any limitation or condition limiting it would be void under the Muhammadan law, but that, taking the transaction as a whole, it was a grant of the usufruct of the property to Musammat Habib-un-nisa for her life. It was not intended to be laid down that the transfer being an *ariat* was invalid.

THE facts of this case appear sufficiently from the judgment under review, reported in I. L. R., 28 All. 264 and Weekly Notes, 1905, p. 269, and also from the order on the present application for review.

Mr. *R. Malcomson* for the applicant.

BANERJI, J.—This is an application for a review of the judgment passed by us in this case on 16th November 1905. In that judgment, which is reported in I. L. R., 28 All., 264, the following passage occurs :—"It is manifest that the intention was to transfer to the lady the right to enjoy the usufruct of the property for her life. This under the Muhammadan law would be what is known as an *ariat*, and therefore invalid." It is said that we were wrong in saying in our judgment that an *ariat* is invalid and we are asked to expunge the word "invalid" and substitute for it the word "valid." Strictly speaking, this application for review of judgment is not maintainable under section 623 of the Code of Civil Procedure, as the applicant was not aggrieved by the decree or order passed in the case, but as the expression

* Application for review of judgment in F. A. f. O. No. 80 of 1905, decided on the 16th of November, 1905.

(1) I. L. R., 28 All., 264 ; Weekly Notes, 1905, p. 269.

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IN THE MATTER OF THE PETITION OF KHALIL AHMAD.

1908 *April* 3.

BY THE COURT.—We allow the application so far that we direct that the words, " and therefore invalid" be expunged from the judgment. Having regard to the circumstances of the case we make no order as to costs.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir William Burkitt and Mr. Justice Aikman.

RAM BILAS AND ANOTHER (PLAINTIFFS) *v.* LAL BAHADUR AND OTHERS (DEFENDANTS). *

Custom—Finding in favour of existence of custom based upon insufficient evidence—Second appeal—Practice.

Held that where a question arises as to the existence or non-existence of a particular custom, and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law, and the High Court is entitled in second appeal to consider whether the finding is based upon sufficient evidence. *Hashim Ali* v. *Abdul Rahman* (1) approved. *Raj Narain Mittar* v. *Budh Sen* (2) referred to.

IN this case the defendants respondents Nos. 2 and 3 sold to the defendant No. 1 their house in mauza Bilsanda, together with its site. The plaintiffs, zamindars of Bilsanda, sued for recovery of possession of the site and for the ejectment of the defendant vendee. The vendee pleaded that Bilsanda was not an ordinary agricultural village, but a town, that the custom of sales and other transfers without the consent of the zamindars prevails in the abadi and therefore the plaintiffs had no title to eject him. The Court of first instance decreed the plaintiffs' claim, finding that the custom alleged was not established, and that the defendants vendors held the house in question as ordinary agricultural tenants and were not entitled to sell more than the materials of it. The vendee appealed. The lower appellate court (additional Judge of Bareilly) reversed the decree of the first Court and dismissed the plaintiffs' suit upon the main ground that Bilsanda was not a village, but a town, to which the ordinary law as to tenants' houses in the abadi was inapplicable. The plaintiffs

* Appeal No. 83 of 1907 under section 10 of the Letters Patent from a judgment of Griffin, J, dated the 19th June, 1907.

(1) (1906) I. L. R., 28 All., 698. (2) (1904) I. L. R., 27 All. 338.